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In The
# Supreme Court of the United States

DUCHESNE CITY, *et al.*,

*Petitioners,*

v.

SUMMUM,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF AMICI CURIAE OF THE AMERICAN LEGION; VETERANS OF FOREIGN WARS OF THE UNITED STATES; THE MILITARY ORDER OF THE PURPLE HEART, INC.; THE NON COMMISSIONED OFFICERS ASSOCIATION; VETERANS OF THE VIETNAM WAR, INC. & THE VETERANS COALITION IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICI CURIAE[1]

**The American Legion** – The American Legion is a veterans and community service organization representing over 2.6 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor with veterans memorials those who have and do serve our nation's armed forces.

**Veterans of Foreign Wars of the United States ("VFW")** – The VFW is a veterans service organization representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating a GI Bill for the 20th century and developing the national cemetery system. The VFW also fights for the compensation of Vietnam veterans exposed to Agent Orange and

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[1] All counsel of record received notice of *amici's* intention to file this brief at least ten days before this brief was due. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

veterans diagnosed with "Gulf War Undiagnosed Illnesses." The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial and the Women in Military Service Memorial. This case is of great concern to the VFW as it threatens the very veterans memorials the VFW helped create and directly threatens the erection of like veterans memorials in the future.

**The Military Order of the Purple Heart, Inc.** – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

**The Non Commissioned Officers Association ("NCOA")** – The NCOA is a veterans service organization established to enhance and maintain the quality of life for enlisted personnel in all branches of the Armed Forces, National Guard and Reserves. It advocates in the federal legislature on issues that affect enlisted personnel and their families. It provides social improvement programs to help enlisted personnel thrive on active duty, on transition to civilian life and throughout retirement. The NCOA also aids often underpaid enlisted personnel in saving money through merchant program discounts. As the vast majority of veterans are or were enlisted personnel, the NCOA is greatly concerned with the adverse affect a court decision that threatens veterans memorials will have on those it serves.

**Veterans of the Vietnam War, Inc., & The Veterans Coalition ("VVnW")** – The VVnW is an international veterans organization dedicated to assisting U.S. veterans of all wars and all branches of military service through its programs and services. It strives to maintain, improve, preserve and defend the quality of life of all veterans and their families. VVnW provides transitional housing to homeless veterans as they attempt to reintegrate into society, offers psychological and medical care to needy veterans, and works to educate the public about the debilitating effects of Post Traumatic Stress Disorder and Gulf War Syndrome. VVnW opposes any court ruling that threatens veterans memorials. Such rulings only add to the difficulties and struggles

already burdening so many veterans as a result of their military service.

## SUMMARY OF ARGUMENT

The precedent established by the Tenth Circuit lays the foundation for the destruction of all donated veterans memorials nationwide and chills the erection of any future memorials. From the United States Marine Corps War Memorial in Arlington, VA, to the Vietnam Veterans War Memorial on The Mall in Washington, DC, to the myriad Spirit of the American Doughboy WWI memorials like that in Ft. Smith, AR, this precedent will require all governments, from the smallest municipality to the Congress itself, to make an impossible decision: either fail to honor our veterans by any donated monument whatsoever, tear down those that currently exist, or allow a monument honoring our veterans and then, upon donation, erect on the same hallowed ground one that dishonors them.

The Tenth Circuit's ruling is flawed in its legal analysis, as demonstrated by Petitioner, and dangerous to veterans memorials in its practical effect. Failure on the part of this Court to decidedly reverse the Tenth Circuit will cause great harm and enshrine its opinion in law. Amici, therefore, representing millions of veterans nationwide, request this Court secure and protect the future of our nation's veterans

memorials by granting Petitioners writ of certiorari and reversing the Tenth Circuit.

## ARGUMENT

### I. This case is important and the Court should grant the petition to save current and future veterans memorials from destruction.

The American Legion filed an amicus curiae brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. Amici are dismayed to see this prediction become a stark reality in the Tenth Circuit with a precedent laid for the circuits remaining.

The Tenth Circuit concluded that a monument donated to a government entity by a private party remains the donor's private speech. *See Summum v. Pleasant Grove City*, 383 F.3d 1044, 1048 n.2 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269, 1273-74 (10th Cir. 2007). It also concluded that the presence of a donated monument in a public area determines the area's forum and requires the acceptance of any other permanent monument, presumably until all green space has been filled. *See Pleasant Grove*, 383 F.3d at 1050 ("The permanent monuments in the city park therefore make up the relevant forum."); *Duchesne*, 383 F.3d at 1273-74.

This holding, flawed in its legal analysis, is devastating to veterans memorials. These memorials, erected to honor our veterans and the wars and battles in which they fought, account for a massive number of donated memorials erected in the public square. Under this precedent, any governmental entity, from the smallest municipality to the Congress itself, is presented an impossible choice: tear down its memorials donated to honor its veterans, requiring that none be erected in the future, or retain its memorials donated to honor its veterans and, upon request, accept and erect on the same grounds a monument donated to dishonor them.

The Tenth Circuit has authored a recipe for chaos. It has, as well, sealed the destruction of those privately donated veterans memorials within its jurisdiction and established a precedent that threatens those without. As Judge McConnell, joined by Judge Gorsuch, lamented in his dissent from the denial of rehearing, "[e]very park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting). Most towns and cities, out of necessity, will doubtless choose to tear down their veterans memorials rather than dishonor them or clutter their public areas.

Without appropriate action by this Court, then, the destruction of an untold number of veterans

memorials is sealed, and the rest fall deeper under the threatening shadow of a judiciary already proven hostile toward them. *See, e.g., Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

### A. Veterans memorials are a fundamental element of American history and military culture and record those virtues we hold dear as a people.

From the beginning, millions of Americans have given honorable service to this nation in its armed forces, often at cost of their lives. Beginning with the war against the Barbary Pirates of North Africa, the first formal war under our nation's Constitution,[2] this nation has commemorated the service and sacrifice of its veterans through privately donated memorials erected in the public square. Memorials to the

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[2] *See* The Tripoli Monument, United States Naval Academy, Annapolis, Md. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search/ (enter the following into "Search" box: 75005835; then click "Tripoli Monument").

veterans of the War of 1812,[3] the Mexican War,[4] the Civil War,[5] the Spanish-American War,[6] World War I,[7] World War II,[8] the Korean War,[9] the Vietnam War[10] and the Gulf War[11] all bear witness to this. Following

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[3] *See, e.g.*, The Battle Monument in Baltimore, Md. The Historical Marker Database, www.hmdb.org (enter the following into "Search" box: battle monument Baltimore).

[4] *See, e.g.*, The Maryland Soldiers Monument of Baltimore, Md. The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

[5] *See, e.g.*, The African American Civil War Memorial, Washington, D.C. The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

[6] *See, e.g.*, The Spanish-American War Monument, Arlington National Cemetery, Arlington, Va. Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

[7] *See, e.g.*, The Spirit of the American Doughboy, erected in towns all across the United States. The Spirit of the American Doughboy, http://doughboy_lamp.tripod.com/id139.html.

[8] *See, e.g.*, The United States Marine Corps War Memorial, Arlington, Va. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial").

[9] *See, e.g.*, The Korean War Memorial, Pittsburg, Penn., VFW Post 764, http://www.vfw764.org/koreanmem.htm.

[10] *See, e.g.*, The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm.

[11] *See, e.g.*, The Persian Gulf War Memorial Bust. The Smithsonian Institution Research Information System, http://

(Continued on following page)

each conflict, following each time we called upon our own to serve and to die, there arose afterward an instinctive need to commemorate that service in a very public and permanent manner. The result unwaveringly has been a lasting memorial of wood or stone or metal erected to honor and remember those who served and those who died.

Our veterans memorials have become ingrained in our national identity as deeply as any part of our culture could. When one thinks of Iwo Jima, among the first images that come to mind is that of five Marines and a Navy corpsman, battle weary and ragged, struggling to hoist the Colors atop a craggy, body strewn Mt. Suribachi, an image captured in bronze and black granite in a park in Arlington, Virginia. Thoughts of Vietnam unwaveringly turn to a long, spare granite wall standing on The Mall in Washington, D.C., a stark and unchanging roster of those who died in that war. In numerous towns and cities across our nation, World War I is forever tied to their own Spirit of the American Doughboy – life-size sculptures of a lone uniformed soldier of the Great War with arm raised, determinably striding forward. For many black Americans, reflections on the Civil War bring to mind the African American Civil War Memorial, the only national memorial to the black

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siris-collections.si.edu/search (enter the following into "Search" box: NY001479; then click "Persian Gulf War Memorial Bust").

veterans of the war in which the freedom of an entire people was won.

These memorials, honoring the dead and encouraging the living, use words like courage, valor, sacrifice, loyalty, bravery, faithfulness, hope, love, duty and honor. They record events and persons in which these virtues were seen and lived. They provide unchanging examples to young and old alike of what is good and right and honorable. They record the very history of this nation in metal and stone, providing those who view them yet another reason to be thankful for the land in which they find themselves and the Constitution under which they are governed.

Our veterans memorials are a living testimony to our very identity as a nation and as a people. Nothing more defines a nation than those times and causes it has considered worthy of the blood of its sons and daughters. These memorials commemorate those times and causes and the people who fought and bled for them and fight and bleed for them still. This case presents important questions, and if they remain unanswered, veterans memorials will perish.

## II. Allowing the destruction of any veterans memorial is a dishonor and betrayal toward all who have served and those serving even now.

Consider the veterans memorials described in Section I-A, *supra*. While varied in form and effect, and erected in commemoration of different people

from different eras, all share two things in common: they stand in public parks in honor and remembrance of veterans from their respective wars, and they were donated by private parties for permanent display in the public square.[12]

Accordingly, the Tenth Circuit's analysis of the Constitution requires that upon donation and alongside the Iwo Jima memorial, a monument to the benevolence of the prison guards of the Bataan Death March be erected, as well as one to the meritorious contributions of the kamikaze. Upon donation, per

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[12] The United States Marine Corps Memorial (i.e., the Iwo Jima monument), located in a public park in Arlington, Va., was donated by individual Marines and friends of the Marine Corp. *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial"). The Vietnam Veterans Memorial (i.e., The Wall), erected on The Mall in Washington, D.C., was donated by contributions from more than 275,000 individuals. *See* The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm. A great number of Doughboys erected in public parks across the country were donated to their respective towns by private organizations and civic groups. *See* http://members.tripod.com/doughboy_lamp/earlspages/id63.html (click on Anniston, AL, Birmingham, AL, Ft. Smith, AR, etc.). And the African American Civil War Memorial, erected in a public plaza in the heart of Washington, D.C.'s Shaw neighborhood, was donated through private contributions to the Freedom Foundation of the same name. *See* The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

the Tenth Circuit, it is only constitutional that a large bust of Ho Chi Minh, renowned purveyor of democratic principles and human rights, be placed on The Mall along with the Vietnam Veterans War Memorial. Upon donation, the towns across the country with World War I Doughboys must also erect a monument donated to honor the leaders of the Central Powers. And the Tenth Circuit would find that acceptance of the donated African American Civil War Memorial requires acceptance of a donated alabaster sculpture of a hooded man in white robes bearing the title of grand dragon.

Battery Park on Manhattan Island, New York, is replete with donated memorials, veterans and otherwise. It is also the current home of The Sphere and Eternal Flame, memorials to the fallen of September 11, 2001. According to the Tenth Circuit, the people of New York should also be required to accept and erect, upon the same ground, a monument donated to extol the virtues of al-Qaida and the vision of its leaders.

Likewise the U.S. Soldiers Monument in Shelby, Michigan,[13] the Spanish-American War Monument in Arlington National Cemetery,[14] the Maryland Soldiers

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[13] *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: MI000301; then click "U.S. Soldiers Monument").

[14] *See* Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

Monument in Baltimore, Maryland,[15] the countless veterans memorials donated and erected in the public squares of countless towns by The American Legion, Veterans of Foreign Wars, the Fraternal Order of Eagles, etc. – even the Statue of Liberty in New York Harbor – all are privately donated memorials erected in the public square. According to the Tenth Circuit, each of the areas housing these memorials could now be considered public fora in which any donated monument espousing protected speech can and must be displayed regardless of viewpoint.

Exploration and intellectual analysis of the bounds of our rights and liberties under the Constitution is good and necessary. Without it, our rights and liberties would stagnate. The implications of this ruling, however, are astounding: if some are honored, their dishonor must be permitted as well. And all must be honored or none may be honored. This, of course, defeats the very purpose for the act of *honoring*, which is to set apart as special and worthy of consideration a particular person or act or idea. If all must be similarly set apart, then the act of honoring loses its meaning. The Court should grant the petition to preserve veterans memorials now and for the future.

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[15] *See* The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

## III. America's veterans memorials, honoring the service and sacrifice of millions, must be preserved.

The destruction and chilling of our veterans memorials is not a viable option. What effect would the court sanctioned destruction of veterans memorials do to the soldier who even now is patrolling the streets of Baghdad with death at every street corner and behind every door? What would a headline like "Court strikes down veterans memorials" do to the legless Marine in Walter Reed struggling to make sense of his injuries and put his life back together? What would it mean to the homeless veteran on the streets of Chicago? What effect would it have on the remaining veterans who survived Pearl Harbor and suffer nightmares even now?

Our veterans memorials serve as unchanging reminders of who we are as a nation and where we have been. How else should this be done? In forgotten books gathering dust on hidden shelves of forgotten libraries? In motion pictures once watched and put on the shelf and out of mind? Public memorials are among the most powerful tools of remembrance available to the modern world. Each time we see them, our veterans memorials force us to remember, if only fleetingly and only for an instant, that there were those who held the line, that there were those who answered the call, that there were those who rose to the task at peril of their lives to give themselves to something they deemed worthy of their life. They force us to remember that the security and

prosperity of this nation did not come without a price, both high and dear, and that its birth and continued survival has been hard fought and hard won.

Our veterans memorials force us to remember. If we fail to remember, we forget. And if we forget the men and the women and the struggles and the virtues our veterans memorials commemorate, what does that say about us as a people? And what effect will it have in the future when we call on our own to don the uniform once more and go in harm's way? The Court should grant the petition to preserve our veterans memorials, which stand the most to lose in the wake of the Tenth Circuit's ruling.

## IV. Veterans memorials donated to the government for display is government speech.

Veterans organizations, the typical private donors of veterans memorials, do not seek to speak on their own behalf when donating a veterans memorial. Instead, organizations such as amici intend to assist and support the government's role of honoring those who served our nation so well. The government never turns a blind eye during the donation process. On the contrary, government officials are very involved in the development and design of the memorials and must approve the dimensions, design and content of the memorial. This very selection of memorials for the governmental display is itself the exercise of governmental authority, and the government ultimately takes ownership and control of the memorial donated

by the organization. *See, e.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998).

Veterans take an oath upon entering service to uphold the Constitution of the United States. It is the obligation of the United States and their political subdivisions to honor the sacrifice of those who preserved them. Veterans organizations and individuals simply assist the government in fulfilling its role, its duty, to honor those who preserved our freedom and our nation. Thus, the thousands and thousands of veterans memorials across the country, found in almost every city or county, are properly viewed as government speech for the purpose of honoring the sacrifice of those who preserved us a nation.

## CONCLUSION

This Court should preserve our nation's veterans memorials by granting the writ of certiorari and reversing the Tenth Circuit. Millions of veterans, represented by amici, implore it to do so. This Court may, without question, choose another course. It has the power to allow the Tenth Circuit's ruling to stand and thus the veterans memorials to fall. But if it

does, if after repeated warnings[16] and in the face of certain destruction this Court again fails to render our veterans memorials the protection they deserve, this nation will walk that course with heads bowed, not in reverence, but in disgrace, ingratitude and shame. The Petition should be granted.

Respectfully submitted,

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[16] The American Legion filed an *amicus curiae* brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. *See also Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).